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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 52.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, HARRIET B. JONES, ET ALS., APPELLANTS,

vs.

LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, ET ALS., APPELLEES.

BRIEF OF COUNSEL FOR APPELLEES.

WM. WADE HAMPTON,
Of Counsel for Appellees.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 13448

(18,966.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 52.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, HARRIET B. JONES, FREEMAN JONES, LUCIA BEVERLY BERNARD, HUGH S. MORRISON, HACKLEY MORRISON, ELIZABETH MADISON MORRISON, MARIA HACKLEY, MARY HACKLEY, SALLIE HACKLEY, MARY F. HACKLEY, SALLIE STRACHAN HACKLEY, ALEXANDER S. HACKLEY, GERTRUDE HACKLEY, THOMAS H. HACKLEY, and STEPHEN P. HACKLEY, *Appellants*,

vs.

LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, M. G. GIBBONS, M. M. NELSON, E. C. BEACH, S. Y. FINLEY, and GEORGE W. HALL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF WM. WADE HAMPTON, OF COUNSEL FOR APPELLEES.

STATEMENT OF THE CASE.

On March 3, 1807, Congress passed an act prohibiting settlements upon the public lands. Section 1 provides:

"That if any person or persons shall, after the passage of this act, take possession of or make a settlement on any lands

ceded or secured to the United States by any treaty made with a foreign nation, or by a cession from any State to the United States, which lands shall not have been previously sold, ceded or leased by the United States, or the claims to which lands by such person or persons shall not have been previously recognized and confirmed by the United States, or if any person or persons shall cause such lands to be thus occupied, taken possession of or settled, or shall survey or attempt to survey, or cause to be surveyed any such lands, or designate any boundaries thereof by marking trees or otherwise, until thereto duly authorized by law, such offender or offenders shall forfeit all his or their right, title and claim, if any he has or they have, of whatsoever nature or kind the same shall or may be to the lands aforesaid, etc."

"And it shall moreover be lawful for the President of the United States to direct the marshal, or officer acting as marshal, in the manner hereinafter directed; and also to take such other measures and employ such military force as he may judge necessary and proper to remove from lands ceded or secured to the United States by treaty or cession as aforesaid, any person or persons who shall hereafter take possession of the same, or make, or attempt to make a settlement thereon until thereunto authorized by law. And every right, title or claim forfeited under this act shall be taken and deemed to be vested in the United States without any other or further proceedings."

Section second has no application to this case.

On March 30, 1822, an act was passed by Congress, making the act of March 3, 1807, applicable to the Territory of Florida. The bill alleges that about the month of November, 1823, Robert J. Hackley made settlement upon, inhabited, and cultivated a certain tract of land situated on the east side of Hillsborough river, at its confluence with the eastern arm of Tampa bay in the Territory (now State) of Florida, etc., and that he remained there until dispossessed by the troops of the United States in the month of February, 1824, under command of Colonel George M. Brooke, and that Hackley continued to reside in Florida until his death, in 1845. Complainants attach Exhibits "A," "B," "C," "D,"

and "DD" to bill. That the said troops continued in the occupancy thereof until December 10, 1830, when the property was established as a military reservation by an executive order of the President of the United States.

On April 22, 1826, and while lands were occupied by the Government troops, Congress enacted:

"That every person, or the legal representative of any person, who being either the head of a family, or twenty-one years of age, did on or before the first day of January, in the year one thousand eight hundred and twenty-five, actually inhabit and cultivate a tract of land situated in the Territory of Florida, which tract is not rightfully claimed by any other person, and who shall not have removed from said territory, shall be entitled to the right of pre-emption in the purchase thereof, under the same terms, conditions, restrictions, provisions and regulations in every respect as are directed by the act entitled 'An act giving the right of pre-emption in the purchase of lands to certain settlers in the Illinois Territory,' passed February fifth, one thousand eight hundred and thirteen, provided that no person shall be entitled to the provisions of this section who claimed any tract of land in said territory by virtue of a confirmation of the commissioners, or by virtue of any act of Congress."

Section 2 of said act of February 5, 1813, reads as follows:

"That every person claiming a preference in becoming the purchaser of a tract of land in virtue of this act, shall make known his claim by delivering a notice in writing to the register of the land office for the district in which the land may lie, wherein he shall particularly designate the quarter section he claims, which notice the register shall file in his office on receiving twenty-five cents from the person delivering the same. And in every case where it shall appear to the satisfaction of the register and receiver of public moneys of the land office that any person who has delivered his notice of claim is entitled according to the provisions of this act to a preference in becoming the purchaser of a quarter section of land, such person so entitled shall have a right to enter the same with the register of the land office on producing his receipt from the receiver of public moneys for at least one-twentieth part of the purchase-money, as in the case

of other public lands sold at private sale; provided that all lands to be sold under this act shall be entered with the register at least two weeks before the time of the commencement of the public sales in the district wherein the land lies; and every person having the right of preference in becoming the purchaser of a tract of land, who shall fail to make his entry with the register within the time prescribed, his right shall be forfeited, and the land by him claimed shall be offered at public sale with the other public lands in the district to which it belongs."

The reservation was from time to time reduced until June 1, 1878, the same only embraced 148.11-100 acres, as described in the bill. On January 4, 1883, the "Reduced Fort Brooke military reservation" was relinquished and transferred by the Secretary of War to the Interior Department, in accordance with law. On March 3, 1823, Congress passed an act authorizing the President of the United States to establish a land office in each district of East and West Florida as soon as, in his opinion, there was a sufficient quantity of public lands surveyed in either district to authorize the opening of one or both of said land offices (3d Stat., 750). A land office was duly established in St. Augustine in 1828. In the year 1835 Robert J. Hackley filed in the United States land office at St. Augustine, Florida, certain affidavits, being "A," "B," "C," "D," and "DD," attached to complainants' bill.

On November 27, 1843, he mailed a letter or notice to the register of the land office at Newnansville, Florida, as follows:

TALLAHASSEE, FLA., *November* 27, 1843.

SIR: You will please take notice that I claim the right of pre-emption to the tract of land known as Cantonment Brooke, Bay of Tampa, under the pre-emption act approved April 22, 1826, and that I have filed proof of the same in the register's office at St. Augustine.

Very respectfully your obedient servant,

R. J. HACKLEY.

Register of the land office at Newnansville, Florida.

Robert J. Hackley died in 1845. The bill does not disclose when the administrator of the estate of Robert J. Hackley was appointed, but on September 26, 1887, T. H. Randolph, administrator of the estate of Hackley, filed some kind of notice in the United States district land office at Gainesville, and on October 14, 1887, filed an application to pre-empt the land involved under act of April 26, 1822, act February 5, 1813, and act July 5, 1884. This application was rejected.

On March 22, 1883, the diagram of the official survey of the "Reduced Fort Brooke military reservation" was received by and filed in the local land office at Gainesville, Florida, and Edmund S. Carew, the husband of Lizzie W. Carew, appeared in person and made homestead entry upon the said lands.

April 2, 1883, the Commissioner of the General Land Office telegraphed the register and receiver to allow no entries upon any of said lands.

On January 22, 1884, the Commissioner of the General Land Office held for cancellation the homestead entry 11637 of Edmund S. Carew. An appeal was taken to the Secretary of the Interior, and on March 16, 1884, he affirmed the decision of the Commissioner. On May 10, 1887, the acting Secretary of the Interior reopened the case on the application of Daniel Mather, under the act of July 5, 1884, and allowed Daniel Mather to make pre-emption entry. On May 17, 1889, the Secretary reconsidered the decision of May 10, 1887, and directed a hearing before the register and receiver to determine the rights of the various claimants to the land. Edmund S. Carew died in 1886. Lizzie W. Carew, widow of E. S. Carew, made proof of settlement, residence, and cultivation by her husband and on her own part. On December 10, 1887, the register and receiver rejected the claim of Lizzie W. Carew and found in favor of the Hackley heirs, but declined to allow the entry of the Hackley heirs for reasons set forth in the bill. An appeal was taken to the Commissioner

of the General Land Office, and on December 10, 1890, the Commissioner affirmed the decision of the register and receiver (Exhibit G to bill). An appeal was taken to the Secretary of the Interior, and on the 25th day of November, 1892, the Hon. John W. Noble, Secretary of the Interior, rendered his decision rejecting the claim of the Hackley heirs and those of all others (Exhibit "F" to bill). All claimants moved for review and reconsideration of the decision of November 25, 1892, and on July 24, 1894, Hon. Hoke Smith, then Secretary of the Interior, rendered his decision, wherein he allowed and reinstated the entry of Edmund S. Carew as to lots 9 and 10 of section 24, township 29 south of range 18 east (Exhibit "J" to bill).

On September 9, 1895, Lizzie W. Carew, as the widow and sole heir-at-law of Edmund S. Carew, made final proof and commuted homestead entry for said lot; the same was approved for patent on July 29, 1896, and patent duly issued July 30, 1896. Subsequently James W. Bilbie *et al.* applied to the Department of the Interior to institute a suit to set aside and annul the said patent, alleging fraud in the procurement thereof. On the 8th day of March, 1898, the Secretary of the Interior denied and dismissed the petition (Exhibit "K" to bill).

The complainants allege in their bill the following conveyances, to wit:

Lizzie W. Carew to W. W. Hampton, October 4, 1895; Lizzie W. Carew to J. H. and W. W. Williams, May 20, 1896; W. W. Hampton and wife and Lizzie W. Carew to George W. Hall, March 7, 1896; J. H. and W. W. Williams to W. W. Hampton, June 4, 1896; W. W. Hampton to J. H. and W. W. Williams, June 15, 1896; J. H. and W. W. Williams to M. M. Nelson, June 4, 1896; J. H. and W. W. Williams to E. C. Beach, June 27, 1896; J. H. and W. W. Williams to S. Y. Finley, June 27, 1896; J. H. and W. W. Williams to Gunby & Gibbons, April 4, 1897; J. H. and W. W. Williams to Lizzie W. Carew, March 5, 1900; and

that the said several conveyances were made without real, legal, or valuable consideration, were collusively made for the purpose of injuring and defeating the rights of complainants, and that the said defendants were fully advised and had full knowledge of the rights and interests of the complainants in the land; and pray that the court will construe and interpret the acts of Congress recited in the bill, so far as the same are applicable to the case; that the defendants may be decreed to hold the legal title in trust for the complainants; that the defendants be required, upon payment to them of the Government price of the land and such further and reasonable charges as the court may find to be just and right, to convey the said land to the complainants, for general relief, and for process.

The complainants afterwards filed an amendment to the bill of complaint praying that the defendants be decreed to render a statement of all sales and conveyances made by them, and that they be decreed to hold the same in trust for and to pay the same to the complainants on such terms and conditions as may be agreeable to equity. * * *

The defendants demurred to the complainants' bills; the demurrers were argued and submitted, and on the 7th of February, 1902, the Hon. James W. Locke, judge, sustained the demurrers of the defendants and dismissed complainants' bills (order, p. 77, Trans.).

On the 29th of November, 1901, complainants amended bill by alleging that the decision of the Secretary of the Interior awarding the right to enter the said land was based upon erroneous conclusions of law, and that said patent was issued illegally and in mistake of the law and in violation of the rights of complainants.

The court made a statement of his findings, which appears at pages 77 and 78, Transcript.

From this decree dismissing complainants' bills the complainants appealed to the circuit court of appeals, fifth circuit.

On March 24, 1903, the circuit court of appeals affirmed the decree of Judge Locke, the decision being unanimous. (See Trans., pp. 83 and 84.)

The appellants have appealed from the decision of the circuit court of appeals to this court, and have filed seven assignments of error, recited in the record on pages 85 and 86.

Argument and Citation of Authorities.

It is unnecessary in the consideration of this case to argue each assignment separately. In order to present the case properly it is necessary to argue the several grounds of demurrer that were filed and presented in the court below in the order in which they appear in the record.

The consideration of the questions raised by the several demurrers involves the interpretation and construction of the several acts of Congress recited in the complainants' original bill and the application thereof to the facts as developed before the Land Department of the Government. The appellants have cited several decisions of the Supreme Court of the United States prescribing certain rules of interpretation of statutes.

Sieman's Adm'r *vs.* Sellers, 123 U. S., 285.
Smith *vs.* Townsend, 148 U. S., 490.
140 U. S., 453, 475.

But the rules of interpretation as pointed out by those decisions cannot be invoked in the consideration of the acts of Congress applicable to this case. "The intent of the statute is the vital part and the essence of the law." *This is the intention embodied and expressed in the statute.* A legislative intention to be efficient as law must be set forth in a statute. It is therefore a written law. How the intention is to be ascertained is only answered by the principles and rules of exposition. If the *statute is plain, certain, and un-*

ambiguous, so that no doubt arises from its own terms as to its scope and meaning and bare reading suffices, *then interpretation is needless;* and where the intention of a statute has been ascertained by the application of the rules of interpretation they have served their purpose, for all such rules are intended to reach that intent.

The rules of construction with which the books abound apply only where the words used are of doubtful import; they are only so many lights to assist the courts in arriving with more accuracy at the true interpretation of the intention. This is true whether the statute be public or private, general or special, remedial or penal. These rules are a part of the law of the land equally with the statutes themselves, and not much less important. The function of such interpretation unrestrained by settled rules would introduce great uncertainty and would involve a power virtually legislative.

Sutherland on Stat. Cons., s. 234.

Courts are not at liberty to speculate upon the intention of the legislature where words are clear and to construe an act upon their own notions of what ought to have been enacted.

Sutherland on Stat. Cons., s. 235.

The statute is its own expositor. If the true sense can thus be discovered, there is no resort to construction. If the legislature has expressed its intention in the law itself with certainty, it is not admissible to depart from that intention on any extraneous consideration or theory of construction. Very strong expressions have been used by the courts to emphasize the principle that they are to derive their knowledge of the legislative intention from the words or language of the statute itself which the legislature has used to express it, if a knowledge of it can be so derived.

Sutherland on Stat. Cons., s. 236, and authorities there cited.

If the words of a statute are free from ambiguity and doubt and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation. The statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus enacted will prevail without resorting to other means of aiding in the construction. The legislature must be understood to mean what it has plainly expressed, and this excludes construction. The legislative intent being plainly expressed so that the act read by itself or in connection with other statutes pertaining to the same subject is clear, certain, and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms.

Sutherland on Stat. Const., s. 237.
United States *vs.* Fisher, 2d Cranch, 358.
United States *vs.* Hartwell, 6th Wallace, 395.
State *vs.* Buckman, 18th Fla., 267.
Denn *vs.* Reid, 10th Peters, 524.

Even when a court is convinced that the legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of language which is free from ambiguity. The courts have then no power to set it aside, or evade its operation by forced and unreasonable construction. Whether the law be expressed in general or limited terms, the legislature should be held to mean what they have plainly expressed, consequently no room is left for construction.

Sutherland on Stat. Cons., s. 237.
United States *vs.* Fisher, 2d Cranch, 358.

When the meaning of a statute is clear and its provisions are susceptible of one interpretation, that sense must be accepted as the law. For this purpose all parts of the statute are to be read and compared. It would be dangerous in the extreme to infer from extrinsic circumstances that the case for which the words of the instrument especially provided shall be exempt from its operation.

Sutherland on Stat. Cons., s. 238, and authorities there cited.

Again, all consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes *in pari materia*, are treated prospectively and construed together as though they constituted one act. This is true, whether the acts relating to the same subject were passed at different times, separated by long or short intervals at the same session or on the same date. They are all to be compared and harmonized if possible, and, if not susceptible of a construction which will make all their provisions harmonize, they are made to operate together so far as possible consistently with the evident intent of the latest enactment.

Sutherland on Stat. Cons., s. 283, and authorities there cited.

The statute must be construed with reference to the whole system of which it forms a part, and statutes upon cognate subjects may be referred to, though not strictly *in pari materia*.

Sutherland on Stat. Cons., s. 284.

These several acts of Congress are plain, clear, and unambiguous, and no extraneous facts are necessary in aid of construction. The mere interpretation by the court of the language of the several acts of Congress is all that is necessary to arrive at, and fully ascertain, the meaning and intent of

the law-making power. But should the court find any difficulty in the proper interpretation of the said acts, and should deem it necessary to consider extraneous facts in aid of construction, we contend that counsel for appellants in their brief have gone beyond the limits in citing what they term extraneous facts and circumstances.

Extraneous Facts in Aid of Construction.

Where the meaning of the statute or any statutory provision is not plain, the court is warranted in availing itself of all legitimate aids to ascertain the true intention, and among them are some extraneous facts.

In the 108 U. S., 254, the court says:

"Nor are we willing to accept the debates that are reported as occurring in Congress at the time of the passage of the deficiency appropriation act, of March 3, 1873, as evidence of the meaning of the clause on which the controversy in this case depends."

"The question is whether according to its correct construction that clause authorized the parties to execute the agreement into which they entered."

Again, in the case of The United States *vs.* The Union Pacific R. R. Co., 91st U. S., page 79, the Supreme Court uses this language:

"In construing an act of Congress we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for, or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts may, with propriety, in construing a statute, recur to the history of the times when it was passed, and this is frequently necessary, in order to ascertain the reason, as well as the meaning of particular provisions in it."

Aldridge *vs.* Williams, 3 Howard, 24.
Preston *vs.* Browder, 1 Wheat., 120.
Sutherland on Stat. Cons., p. 384.

It is clear, therefore, from the repeated declarations of this Supreme Court, that it is not admissible for the court to consider the debates in Congress at the time of the passage of the act of April 22, 1826, in order to interpret or construe that act, but that the language of the act itself must control.

Applying these principles of interpretation, I invite the consideration of the court to the first ground of defendants' demurrer:

"*That the alleged settlement and cultivation by Robert J. Hackley of the lands involved, in* 1823 *and* 1824, *did not confer upon, or vest in the said Robert J. Hackley, any right or lawful claim to any part of the land described in complainants' bills, because such entry upon, and possession of, said lands was without authority of law and in direct violation of the acts of Congress in force in the State of Florida at that time* (*act March* 3, 1807, 2*d Stat.*, 445; *act March* 30, 1822, 3*d Stat.*, 654)."

The acts above recited embodied the law in force in Florida at the time and date of the settlement of Hackley and his ejectment from the land by authority of the War Department of the Government.

Hon. Hoke Smith, Secretary of the Interior, in his decision, at page 4, says:

"At the time, the provisions of the act of March 3, 1807 (2d Stat., 445), were in force in the State of Florida, having been re-enacted in the act providing for the establishment of a territorial government in said State on March 30, 1822 (3d Stat., 654). The first section of the act of March 3, 1807, *supra*, provided:

"'That if any person or persons, shall, after the passage of this act, take possession of, or make a settlement on, any lands ceded or secured to the United States by any treaty made with a foreign nation, or by any cession from any State of the United States, which land shall not have been previously sold, ceded or leased, by the United States, or the claim to which lands, by such person or persons, shall not have been previously recognized and confirmed by the United States, or if any person or persons, shall cause such lands to be thus occupied, taken possession of or settled, or

shall survey, or attempt to survey, or cause to be surveyed any such lands, or designate any boundaries thereof, by marking trees or otherwise, until thereto duly authorized by law: such offender or offenders shall forfeit all his or their right, title and claim, if he hath, or they have, of whatsoever nature or kind the same shall or may be to the land aforesaid, which he or they shall have taken possession of or settled, or caused to be occupied, taken possession of or settled, or which he or they shall have surveyed, or attempted to survey, or caused to be surveyed, or the boundaries thereof he or they shall have designated, by marking trees or otherwise.'

"When R. J. Hackley was ejected from said land by the military in 1824 he could not, in view of the provisions of the act above quoted, have initiated any claim to said lands by virtue of his settlement."

Prior to this decision of Secretary Smith, to wit, on November 25, 1892, Hon. John W. Noble, Secretary of the Interior, in construing these statutes and applying the facts thereto, says:

"Besides, by the law in force at the date of Hackley's said settlement, persons were not allowed to settle upon any of the lands of the United States, except as tenants at will, under contract to be entered into with the local land officers. See act of Congress approved March 3, 1807 (Stat., 445), act of March 30, 1822, sec. 9 (3d Stat., 654). There can hardly be serious question, I think, that when the officers of the Government selected the site of said reservation, Hackley had no right thereto."

The authorities cited by Secretary Noble clearly sustain his decision and show conclusively that Hackley did not, and could not, acquire any vested rights by his unlawful entry upon unsurveyed Government lands.

Counsel for complainants have argued extensively and cited debates in Congress to show that the act of 1807 did not apply to the case of Hackley. But the language of the act of 1807 is too plain to admit of doubt. If the act of 1807

did not apply to *bona fide* settlers, why was it necessary for Congress to pass the remedial act of April 22, 1826?

"The *act of 1807 applied to all settlers.*"

1st. Because, in the act admitting Florida as a territory, the public land laws were extended only over *surveyed lands*, and any land legislation affecting Florida could therefore apply only to such surveyed lands.

2d. Because the act of 1807 made settlement on both surveyed and unsurveyed lands in Florida illegal, and before the settlement of Hackley was legalized, *if at all, by the act of 1826*, the land was formally appropriated by the President for public uses, and whatever rights he may have had were extinguished.

3d. That the act of 1807 *did* apply to all classes of settlements is proven by the fact that the President calls upon *all settlers* to sign a certain declaration, or take the consequences, which would be expulsion, regardless of the quality of their settlements. Certain claimants, viz., claimants under Georgia grants, *will have the law enforced against them*, but the others will not. Plainly, he regards them all as illegal, but in some cases, where *no right is claimed* by virtue of the settlement, the squatters will not be disturbed, in order that they may have the right to take advantage of future legislation of a more generous nature, should any be passed. In doing this he is simply exercising the discretion which the law seems to give him *of enforcing the law*, or not enforcing it, as he chose. The act was plainly passed for the purpose of preventing any person or persons from selling uncertain claims to innocent purchasers, pending future investigations by Congress, and in order to make it possible of enforcement *all* settlements were declared illegal. If this had not been done, the law would have been a dead letter. The law uses the words "right" and "claim" "of whatsoever nature or kind" and says "that if any person shall, after the passage of this act,

take possession of, or *make a settlement on* any lands, etc." Private land claimants were not required to make settlement, consequently this language could not refer to them, nor would their claims have been referred to as a "right," that word being technical in the Land Department and public land laws, as referring to a privilege or property accruing only under the *settlement laws*. Even settlements made *prior to the passage of the act are not legalized—such settlers only* remaining as *tenants at will* of the United States, with no promises held out to them, for at this time, as at the time of Hackley's settlement, there *was no law of the United States under which titles to lands, by purchase* or settlement, could be acquired in the State of Florida.

4th. Because even if the act of 1807 does not apply to Hackley's settlement such settlement was illegal and of no force or effect against the United States or any subsequent claimant, because there was at that time no law under which he could acquire title to the land, and before such a law was passed the land was segregated from the public domain by actual occupation by the Government for governmental purposes and by order of the Secretary of War. While the act of 1826 extends the privilege of the act of 1813 in all cases where settlement was made prior to January 1, 1825, except where the land was "rightfully claimed by any other person," and did not mention any other exceptions, it is simply folly to claim that lands set apart for public purposes were not so excepted. If Hackley had had a *settlement right* under some then existing law, even *that right* would have been forever extinguished when the land became a military reservation. This is a well-settled principle. But he had no such right, because no law existed under which he could get it. He was simply a trespasser, or, looking at it most favorably, a sort of tenant at will, and when the Government called upon him for the land in the manner contemplated by the second section of the act of 1807, he gave it up. Why? Because he

could not help himself. There was no law under which he could claim it, and he knew it. The best he could hope for was that Congress would some day pass a law which would fit his case. That law has never been passed. If Hackley's heirs are entitled to this land now, Hackley was entitled to it when the act of April 22, 1826, was signed by the President. Why did not his claim prevail then, and why has it not prevailed in all the years since? The answer is simple: The land was "rightfully" appropriated by the United States, and the act of 1826 did not apply thereto. If it had remained a military reservation, the right of the Government to keep it so, regardless of any claim that Hackley might make, certainly could not have been questioned. How, then, can his heirs dispute the right of the Government to dispose of its own property in its own way? Have they such an inchoate right as would prevent it? Under what law did they get it, and did it exist when the Government quietly took possession of its own land, free of all encumbrances or claims, for its own uses? In order to show how absurd the claim is, we might stretch the time of this reservation to 200 years and have the Hackley heirs still interposing to prevent the Government disposing of its property, because Hackley squatted on it once when there were no public-land laws.

In discussing the act of 1807 counsel seek to show that Hackley was a pioneer, and therefore entitled to special consideration, yet claim that, in this act, Congress conferred upon him rights and privileges in section 1 which were denied to pioneers who preceded him by section 2. They also assert that Hackley claimed *no legal right* by virtue of his settlement *until such right should be conferred by Congress*, yet they demand that this settlement be considered sufficient to prevent the Government disposing of this property to other persons. They entirely pass over the known and accepted segregating effect of a military reservation, because,

should they mention that, their entire argument would be baseless.

The act of 1807 not only makes illegal settlements of *any* character on *unsurveyed* lands, but *surveyed lands as well.* Even though the settlement would have been legalized by the act of April, 1826, the fact remains that when the land was formally taken possession of by the Government the settlement was illegal. What transpired after that in the way of legislation can cut no figure in this case, for on that day the land Hackley had settled upon ceased to exist as public land, and *was outside the pale of any legislation of a general nature, such as the act of* 1826. It is a known and accepted rule that lands set apart for public purposes cannot be disposed of *except by special legislation* or *legislation general to that class of lands only.*

Counsel for appellants, *while admitting that the possession and occupancy of the land in controversy by Hackley was not lawful,* contend that the act of Congress did not require lawful possession or occupancy, but simply "actual possession." Yet they argue very earnestly and strenuously that the act of 1807 did not apply to the settlement of Hackley, because the same was not intended to affect *bona fide* settlers, and invoke the construction placed upon the act of 1807 by the Secretary of the Treasury in 1808 in support of this contention. But the mere reading of the quotation from the language of the Secretary of the Treasury is sufficient to justify the conclusion that the interpretation put upon the language of that officer by counsel for appellants is entirely erroneous, and cannot control or influence the judgment of the court in the case at bar.

The Secretary of the Treasury, in the letters referred to, was only discussing the policy of the President as to the course to be pursued in dealing with the several classes of unlawful settlers, the act of 1807 leaving such matter entirely within the discretion of the President. The Secretary does not undertake to declare whether or not any *settlement*

could be lawful or *bona fide upon public lands* at that time. If it be true, as contended by counsel for appellants, that Hackley had no claim and asserted no claim to the lands by virtue of his alleged settlement and occupancy in 1823 and 1824, *then* he *could not predicate* or *initiate any pre-emption right* by *virtue of* such settlement.

A pre-emption claimant is defined to be "one who has settled upon land subject to pre-emption, with the intention to acquire title to it, and has complied, or is proceeding to comply, in good faith, with the requirements of the law to perfect his right to it."

Black's Law Dictionary, p. 925.
Hosmer *vs.* Wallace, 97 U. S., 575.

In above case this court held "that the occupation of the lands by the plaintiff was a mere intrusion upon the claim of another without any license of the Government;" and at page 581 uses this language:

"The term *bona fide*, as applied to the pre-emption claimant, does not change the qualifications of such claimant, nor the conditions upon which, under the general law, settlement with a view to pre-empt is permitted."

It is clear, therefore, that Hackley, not being a *bona fide* settler, but merely a casual occupant, not claiming any interest in, right or title to the property involved, his possession was, in contemplation of law, *mala fide*, and he acquired no rights, present or future, in the property.

Black's Law Dictionary, p. 914.

Nor was there any actual possession of the property as defined and contemplated by law, unless Hackley went upon the land, claiming some ownership and title to the property, and exercised acts of ownership over it.

Black's Law Dictionary, p. 914.

If he went upon the land and exercised acts of ownership, then he violated the laws of the United States, and was amenable to the penalties for such violation.

If Hackley did not acquire any vested rights under the acts of 1807 *and* 1822, *could he acquire any vested rights under the act of April* 22, 1826? *This question is raised by the second ground of demurrer. That—*

"*The act of April* 22, 1826, *giving the right of pre-emption to settlers upon lands in Florida, pursuant to the terms and provisions of the act of February* 5, 1813, *did not and could not have a retroactive effect upon the unlawful possession of the unsurveyed lands, described in complainants' bills by Robert J. Hackley, because the said acts referred to surveyed lands of the Government and were not intended to confer pre-emption rights in unsurveyed Government lands.*"

Secretary Noble, in his opinion denying Hackley's claim, says:

"Let us first inquire what rights Hackley acquired under said act of 1826. The first section of said act provided: 'That every person, or the legal representatives of any person, who being either the head of a family, or twenty-one years of age, did, on or before the first day of January, in the year one thousand, eight hundred and twenty-five, actually inhabit and cultivate a tract of land, situated in the Territory of Florida, which tract is not now rightfully claimed by any other person, and who shall not have removed from the said Territory, shall be entitled to the right of pre-emption in the purchase thereof under the same terms, restrictions, conditions, provisions and regulations in every respect, as are directed by the act entitled 'An act giving the right of pre-emption in the purchase of lands to certain settlers in the Illinois Territory,' passed February the fifth, one thousand eight hundred and thirteen (2 Stat., 797)."

By section 2 of said act of 1813, persons claiming a preference right of entry were required to file with the proper local land officers a notice particularly describing the quarter section which he claims, and any person entitled to a

preference right of purchase who shall fail to make entry of the land claimed by him at least two weeks before the commencement of the public sales shall forfeit his right, and the land claimed by him shall be offered at public sale with the other public lands in the district to which it belongs. His settlement was clearly illegal, and, by the express terms of said act of 1826, said reservation, being rightfully claimed as a reservation, was excepted from its provisions.

In the case of Frisbie *vs.* Whitney (9th Wallace, 187) the Supreme Court held that occupation and improvement on the public lands with a view of pre-emption confer no vested right in the lands so occupied; that such vested right is only obtained under the pre-emption laws, where the purchase-money has been paid and the receipt of the proper land officer given to the purchaser, and that until this is done Congress may legally withdraw the land from entry or sale, though this may defeat the imperfect right of the settler. In the opinion of the court, pp. 196, 197, it is said:

"The argument is urged with much zeal that because complainant did all that was in the power of anyone to do towards perfecting his claim, he should not be held responsible for what could not be done. To this we reply, as we did in the case of Rector *vs.* Ashley (6 Wallace, 142) that the rights of the claimant are to be measured by the acts of Congress, and not by what he may, or may not be able to do, and if a sound construction of these acts shows that he had acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient."

This ruling was reaffirmed by the Supreme Court in the Yosemite Valley case (15th Wallace, 77), and in Shepley *vs.* Cowen (91 U. S., 330, 337).

In the case of Atherton *vs.* Fowler (96 U. S., 513, 517) Mr. Justice Miller said:

"In the earliest stages of our land system no right or interest could be secured by the individual in any public land

until it had been surveyed into legal subdivisions. Nor after this had been done was it subject to sale until, by a proclamation of the President, it was brought into market ——, it often occurred that emigration, in advance of the readiness of the public lands for these sales, had caused hundreds and thousands to settle on them; and when they came to be sold at public auction, their value enhanced by the houses, fences, and other improvements of the settler, placed them beyond his reach and they fell into the hands of heartless speculators. To remedy this state of things, the pre-emption system was established. This at first was only applicable to lands which had been surveyed, but gradually this was changed, until, in 1862, pre-emptors were allowed on unsurveyed lands as well as those surveyed" (act of June 2, 1862, 12 Stat., 418).

The Government has never offered said reservation for sale. On the contrary, the War Department, legally acting, presumably by direction of the President, took possession of the said land and continued in possession thereof until it was relinquished to this Department for disposal under the laws then existing.

Secretary Smith, in interpreting the act of 1813, takes the same view that was held by Secretary Noble (Trans., pp. 44 to 57).

But counsel for appellants admit that Hackley acquired no rights under the act of 1807, and say:

"He could not 'forfeit' his claim, or title, because he made no claim, and acquired no title until his statement had been covered by law."

Lytle *vs.* Arkansas, 9 How., 314.

But they contend that the act of 1826 instantly created an estate *in presenti* in the settler, R. J. Hackley. Let us analyze the acts of April 22, 1826, and February 5, 1813:

1st. The act of 1826 requires actual inhabitance and cultivation on or before January 1, 1825.

2d. Right of pre-emption in the purchase of certain lands, under the same terms, restrictions, conditions, provisions, and regulations in every respect as are directed by the act of February 5, 1813.

3d. The land must not be rightfully claimed by any other person.

4th. The act of February 5, 1813, requires:

A. *Does not apply to lands reserved from sale by former acts.*

B. *Every person claiming preference in becoming the purchaser of a tract of land, etc., shall make known his claim by delivering a notice in writing to the register of the land office for the district in which the land may lie, wherein he shall particularly designate the quarter section he claims.*

C. The register shall file this notice on receiving twenty-five cents from the person delivering the same.

D. And in every case where it shall appear to the satisfaction of the register and receiver of public moneys of the land office that any person who has delivered his notice of claim is entitled, according to the provisions of this act, to a preference in becoming the purchaser of a quarter section of land, such person so entitled shall have a right to enter the same with the register of the land office on producing his receipt from the receiver of public moneys for at least one-twentieth part of the purchase-money, as in case of other public lands sold at private sale.

E. Provided that all lands to be sold under this act shall be entered with the register, at least two weeks before the time of the commencement of the public sales, in the district wherein the land lies.

F. And every person having a right of preference in becoming the purchaser of a tract of land who shall fail so to make his entry with the register within the time prescribed, his right shall be forfeited, and the land by him claimed

shall be offered at public sale with the other public lands in the district in which it belongs.

R. J. Hackley did not comply with either requirement of this act.

Applicants rely upon the case of Lytle *vs.* Arkansas, 9 How., 314.

In that case the facts were entirely different. The court says at page 335:

"Before the grant was made by Congress of this tract, the right of Cloyes to a pre-emption had not only occurred under the provisions of the act of 1830, but he had proved his right under the law, to the satisfaction of the register and receiver of the land office. He had in fact done everything he could do to perfect his right. No fault or negligence can be charged to him."

No such allegation in complainants' bill. The exhibits of complainants, on the contrary, which are made part of their bill, *show that Hackley never paid one cent to the Government; never tendered anything to the officers; that he did not file any petition, but some meager affidavits, that prove nothing.*

In the case of Hutchings *vs.* Low, 15 Wall., 77 (Yosemite Valley case), the court discusses the case of Lytle *vs.* Arkansas at length, and declares that the decision of the court and the doctrines expressed in the opinion are in entire harmony with the principles announced in Frisbie *vs.* Whitney, 9 Wall., 187. In the Hot Springs cases the interpretation of the act of February 5, 1813, was involved.

The court, in discussing the several acts which were involved in the case of Rector *et als. vs.* The United States, cited the opinion of Mr. Wirt, the Attorney General of the United States at that time, and says:

"Mr. Wirt, the then Attorney General, gave it as his opinion that no lands were authorized by law to be sold, which had not been publicly surveyed according to the general system of sections and townships. And as the region in which the Hot Springs were located, was subject to Indian

title until 1818, and had never been publicly surveyed, no lands could be located, etc."

This opinion of the Attorney General was followed by the General Land Office, and patents were refused for any lands thus attempted to be located. Hence the surveyor general did not recognize the survey of Conway and never returned it to the recorder.

And the court further says that the survey of 1820 was never returned to the recorder's office, and therefore the land never became located within the meaning of the act of 1815 or the act of 1822. It never became segregated from the public domain; it never became so appropriated to the claimants as to give them a vested right, etc. But the claimants insist that this was not the fault of Hammond and Rector, and that they did all that they could, and that the surveyor general should not be neglecting his duty, viz., that of recording the survey and returning it to the recorder of land titles, deprived them of their just rights; and the court decided in that case that no rights were vested in the claimants.

Rector *vs.* The United States, 92 U. S., 698.
Bagnell *vs.* Broderick, 13 Pet., 436.
Barry *vs.* Gamble, 5 How., 32.

Counsel for appellants further contend that the act of February 5, 1813, and the act of April 22, 1826, are different from all other laws, providing pre-emption rights enacted by the Congress of the United States, that inasmuch as they provide for pre-emption by parties who were in possession of the property, occupying and cultivating the same, prior to the passage of the act, that the same created an estate *in presenti*, the only conditions alleged being conditions subsequent and not conditions precedent. The fact is that there are conditions precedent prescribed by the said acts, viz., *the filing of the notice, the payment of the money to the register,*

the payment of the money to the receiver, the proof to the satisfaction of the register and receiver, all of which are essential before any right could have been acquired, even under these remedial statutes. This court has passed upon this question and has adjudicated and defined what constitutes an estate in presenti.

In the case of Hall *vs.* Russel, 101 U. S., 507, the court, in construing the "Oregon donation act" (9th Stat. at L., 496), says: "The opening words of section 4 are that there shall be and hereby is granted." This is appropriate language in which to express a present grant. It is well remarked by Mr. Justice Field for the court in Mo., Kan. & Tex. R. R. Co. *vs.* The Kan. Pac. R. R. Co. (97 U. S., 491): "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made, is a law, as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. If then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future and not in presently. In all cases in which we have given these words the effect of an immediate and present transfer, it will be found that the law has designated a grantee qualified to take, according to the terms of the law, and actually in existence at the time (citing a number of authorities), and without particularizing further, it may be said generally, that in the swamp land cases, and of the internal-improvement-grant cases, where for the most part the question has arisen of late, if a grant has been held to take effect presently, the State, or some corporation having all the qualifications specified in the act, has been designated as grantee. In other words, when an immediate grant was intended an immediate grantee, having all the requisite qualifications, was named.

Coming, then, to the present case, we find that the grantee

designated was any qualified "settler or occupant of the public lands, and shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of the act. The *grant was not to a settler only*, but *to a settler who had completed* the *four years of residence, etc.*, and *had otherwise conformed* to the *act*. Whenever a settler qualified himself to become a grantee, he took the grant, and his right to the transfer of the legal title from the United States became vested, but until he was qualified to take there was no actual grant of the soil, etc."

Mr. Hackley never attempted to make an entry of these lands. He merely wrote a letter to the register (p. 88, Trans.). This was not an entry. He should have followed this up by paying the money required by the law to the receiver and should have presented the receiver's receipt to the register in accordance with the act of 1813. He could then have made demand upon the register to permit the entry. The demand without this was of no force or effect.

Counsel for appellants also overlook the fact that there is no allegation that the register and receiver were satisfied that Hackley was entitled, according to the provisions of the acts, to a preference in becoming a purchaser of the land. The exhibits do not disclose such ruling. In the absence of proof thereof, the presumption—at this late date—is that the claim of Hackley was disallowed and denied by the register and receiver; *such denial* was final, and *the appellants* are *precluded now from asserting title predicated upon such application.*

13 Peters, 511; 9 How., 332; 164 U. S., 345.

The lands having been segregated from the public domain prior to the enactment of April 22, 1826, the said act could not apply to such reserved lands.

The third ground of demurrer to which we invite the attention of the court is:

"The act of April 22, 1826, making the act of Feb. 5, 1813, operative in Florida, did not and could not have a retroactive effect upon the unlawful entry upon and possession of the lands described in complainant's bills by the said Robert J. Hackley, for the reason that prior to the enactment of April 22, 1826, the said lands had been entered upon and taken possession of by the Government, and the Government continued in possession thereof until the same were platted and offered for entry in 1883."

It is necessary briefly to refer to the facts pertaining to the connection of R. J. Hackley and his administrator with the "Fort Brooke military reservation." Counsel for appellants have discussed this question upon the theory that Hackley made his claim to the lands in 1826. And while repeatedly admitting that Hackley had no claim and asserted no claim to the lands prior to the act of 1826, yet declaring with much emphasis that Hackley was a *bona fide* settler in 1823 and 1824.

We have already shown that Hackley was not and could not be a *bona fide* settler in the absence of the assertion of some lawful claim and right, or ownership of some character. The facts as appear from the allegations of the bill—and by such allegations the appellants are bound—are that Hackley, without any authority and in absolute violation of law, went upon the land, which was afterwards known as the Fort Brooke cantonment, in November or December, 1823, and remained there until February, 1824, when the military authorities took possession of the property by direction of the Secretary of War. This fact is found by the decisions of the Secretary of the Interior, Honorable John W. Noble (p.

39, Trans.), and by Secretary Hoke Smith (pp. 46 and 47, Trans.). Such finding is conclusive and cannot be reviewed by the courts.

The President of the United States, by executive order, formally declared the Fort Brooke cantonment a "military reservation" containing sixteen square miles of land, embracing lands involved in this suit, on December 10, 1830 (Trans., p. 5). After vacating the lands in February, 1824, nothing is heard of Hackley until some time in 1835, when he filed the five affidavits attached to complainants' bill (Trans., pp. 18 to 21, inclusive).

No declaratory statement, no petition, no claim of the land is asserted, but simply affidavits that he had made improvements, resided upon, and cultivated this spot selected by General Brooke as the site since known as "Cantonment Brooke."

A land office was established in the State of Florida at St. Augustine in 1828; subsequently an office was established at Newnansville, Florida, and on November 27, 1843, Hackley filed with the register at Newnansville certified copies of the affidavits above referred to and addressed a letter to the register, claiming the right of pre-emption to the tract of land known as "Cantonment Brooke." No designation as to what part of it was claimed nor the acreage claimed (Trans., p. 8).

Hackley died in 1845. This property remained as a permanent "military reservation" until 1883. No action was taken by either the heirs or the administrator of Hackley's estate in the assertion of any right of pre-emption until September 26, 1887. In the meantime the lands were put upon the market by the Government, Carew's entry was made, he went into possession of the property, cultivated and improved it, remained in possession until his death, and his widow has remained in possession continuously to the filing of the bill herein, except as to those parts thereof sold to and occupied by others. Hackley's administrator waited nearly six years

before asserting any claim and did not then file any proper paper until the 14th of October, 1887. This affidavit or declaratory statement appears at page 22, Transcript. In this affidavit the administrator claims under the acts of April 22, 1826, February 5, 1813, and July 5, 1884, thus admitting that the property was to be disposed of under the provisions of the act of July 5, 1884. Mrs. Carew was at that time in actual possession of the property under the homestead claim of her husband.

These are the facts in accordance with the allegations of complainants' bills and as appear from the finding of the several Secretaries whose decisions are attached to and made parts of the bill.

Upon the subject of this reservation Mr. Secretary Smith says:

"The heirs of Hackley, however, relying upon the provisions of the above-quoted act of 1826, contend that the cantonment which existed from 1824 to 1830, was not such a reservation as will defeat the pre-emption rights of said heirs under the act of 1826.

His position is that when the act of 1826 confirmed in all settlers upon those lands prior to January 1, 1825, the right to purchase the lands whereon they resided, etc., no mere occupancy by the military nor even constructive reservation of an inferior order or dignity could defeat the operation of such an act of Congress.

In support of this position counsel cites the case of Johnson *vs.* The United States, Second Court of Claims, 391. Johnson's claim was based upon what was known as the "Oregon donation act," and, as required by that act, he had settled upon and occupied the land in controversy for four years continuously, with nothing left to be done to secure the patent but to make proof of the same, when the tract was forcibly taken and occupied by the troops of the United States "without the knowledge of the President, the Secretary of War, or any high officer of the Government." In that case the court

held that such occupation was not a reservation within the meaning of the "Oregon donation act," and could not affect the rights of the plaintiff.

In the case at bar, however, the facts are very different. The tract was known as the Fort Brooke military reservation, and was occupied under the direction of the Secretary of War two years before the passage of the act upon which the claim of the Hackley heirs is predicated.

In further support of his views counsel recites the history of Camp Stambaugh, in Wyoming Territory.

It appears that in 1870 the Secretary of War established said military post, which was laid off as a reservation and included all the territory within one mile of the flagstaff erected at the post. In 1881 the Secretary of War notified the Secretary of the Interior that said post, being no longer needed for military purposes, had been discontinued. In said communication he expressed the opinion that inasmuch as there had been no formal reservation of the lands included therein by the President the same might be restored to the public domain, as other lands, without the consent of Congress.

The Secretary of the Interior concurred in this opinion, and said lands were treated as having been restored to the public domain by the act of abandonment, and the subsequent notification on the part of the Secretary of War.

I am unable to see wherein the correspondence above referred to sustained the contention of counsel; for while it may be true that a military post established by the Secretary of War may be restored to the public domain with less formality than if it had been reserved by a former order of the President, still, the Secretary of War had authority to establish Cantonment Brooke, and by virtue of such establishment the lands upon which it was located were not subject to entry so long as unrelinquished.

Where a military post or cantonment is established upon

the public domain, whether the same be for temporary purposes or permanent occupation by the military, if it be done by competent authority, the lands included therein are not subject to entry until properly restored to the public domain.

If the Secretary of War has the authority to establish a military post, it follows that during the time that the lands included therein are occupied for military purposes they are not subject to disposal under the pre-emption laws. In the case of Wilcox *vs.* Jackson, 13 Pet., 498, it was held as follows:

"The President speaks and acts through the heads of the several departments in relation to the subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence we consider the act of the War Department in requiring this reservation to be made, as being in legal contemplation the act of the President; and consequently, that the reservation thus made was, in legal effect, a reservation made by order of the President, within the terms of the act of Congress."

It is further held in said case as follows:

"But we go farther and say that whensoever a tract of land shall have once been legally appropriated to any purpose from that moment the land thus appropriated becomes severed from the mass of the public lands, and that no subsequent law or proclamation, or sale, could be construed to embrace it, or to operate upon it, although no reservation were made of it."

The counsel for the Hackley heirs further contends that the cantonment did not cover the whole of the one hundred and sixty acres to which Hackley's claim attached, and that the appropriation by the military did not, therefore, extinguish his claim to that portion which lay outside the limits of the cantonment.

Counsel insists that inasmuch as the buildings erected for

the accommodation of Cantonment Brooke were located upon what is now known as lot 9 of said tract, that said encampment was therefore limited to the lot upon which said buildings were erected.

This is untenable for the reason that it is necessary for the convenience of the military to appropriate a considerable area of the public domain for wood, water, and other purposes, and the fact that Hackley was ejected from his entire claim was itself an appropriation thereof.

In accordance with the views hereinbefore expressed, therefore, the claim of the Hackley heirs is denied.

"The provisions of the act just mentioned have no application in adjusting any claim made to the land in controversy, for the reason that said land had been segregated and occupied by troops in cantonment for two years, at the date of its passage."

"No entry or sale of any land reserved for the use of the United States or either of the States can be made."

Rector *vs.* U. S., 92 U. S., p. 698.

In this case settlement was alleged and proven as early as 1809. The claimant settled on the land before survey, and was diligent in application to pre-empt, immediately after survey made and plat filed. Claimants also claimed the benefit of a subsequently-enacted enabling act which made the act of February 5, 1813, operative, but prior to this these lands were reserved by the Government. The court decided that, having been reserved before the claimants acquired any vested rights, same were not subject to pre-emption.

"No right can be acquired by cultivation, or possession of land severed from the public domain by a legal appropriation of it for any public purpose. It is not subject to the pre-emption law."

United States *vs.* Fitzgerald, 15 Pet., 407.
Frisbie *vs.* Whitney, 9 Wall., 187.
Hale *vs.* Gaines, 22 Howard, 144.

But counsel for appellants claim that the occupation of the troops of the United States from 1824 to 1830 did not constitute a reservation.

It is not material for the purposes of this case to discuss that proposition. It is admitted by complainants' bill that the property involved was formally reserved by proclamation of the President on the 10th of December, 1830, and the decisions of the Secretaries above referred to hold and find that the lands were so reserved. The lands were occupied continuously by the Government from 1824 until restored to the public domain in 1883. Unquestionably at the time that Colonel Brooke took possession of the property Hackley had no claim, nor did he assert any claim, and the taking possession of the property for the purposes of the military authorities was at that moment a legal appropriation of it for a public purpose.

Counsel for appellants have quoted from the case of U. S. *vs.* Fitzgerald, 15 Pet., at page 418, as follows:

"It cannot be contended that the land in controversy was reserved from sale by any act of Congress, or by order of the President, unless the direction of the Secretary to reserve it from sale several months after it had actually been sold and paid for, could amount to such order, etc."

This citation is inapplicable to the case at bar. There is no allegation in the present bill that the "Ft. Brooke reservation" was made after the lands were sold and paid for, nor that the Government ever received one cent from Mr. Hackley, nor that he ever complied with any of the conditions and requirements of the acts under which complainants claim.

But, as stated by Mr. Secretary Smith, "the lands were occupied by the Government more than two years before the passage of the act of April 22, 1826, and were formally reserved by the executive order of the President five years before Mr. Hackley ever asserted any claim, or that the Government knew that he contemplated doing so.

The President's authority to create reservations was once for all set at rest in the case of Grisar *vs.* McDowell, 6th Wallace, page 379. And even as early as 1827, in construing the act of May 8, 1820, the Supreme Court recognized such reservations. In the case of Chotard *et al. vs.* Pope *et al.* this court says:

"The right to enter is identified with the right to purchase at private sale, and confined to the appropriation of such lands as may be legally appropriated by entry at the register's office; from which are excluded all lands previously appropriated, whether by sale, or by being withdrawn from the mass of lands offered for sale."

"From the earliest date of the legislation of Congress on this subject, there have been appropriations to the public use made by withdrawing from this mass certain portions of territory for public seminaries, towns, salt springs, mines and other objects, and the particular land in controversy was appropriated under a provision of the law, etc."

Walsey *vs.* Chapman, 101 U. S., 755; 12th Wheat., 588.

In discussing this demurrer counsel for appellants assume that the act of April 22, 1826, created in Robert J. Hackley an estate *in presenti*, and that his rights became vested immediately upon the passage of the act and without the performing of any of the conditions prescribed by this act, and by the act of February 5, 1813, on the part of Hackley. They cite a number of authorities to sustain this contention, but upon an examination of such authorities the court will see that all of the cases cited have reference to land grants made to railroads or other corporations or to the States for school or other public improvement purposes. In every case cited we *assert, without fear of contradiction, that the grant is made to a specific grantee named in the act.* These authorities, therefore, can have no application to the case at bar.

N. Y. Indians *vs.* U. S., 170 U. S., 18.

Hall *vs.* Russell, 101 U. S., 503.

Mo., Kan. & Tex. R. Co. *vs.* Kan. Pac. R. Co., 97 U. S., 491.

At the time that Hackley filed his affidavits in 1835 and at the time he wrote the letter to the register of the district land office at Newnansville, Fla., in 1843, this land was not subject to entry. On both dates the land was actually occupied by the Government as a permanent military reservation. Being thus segregated from the public domain, he could not acquire any rights by such attempted pre-emption. But counsel for appellants contend that in 1883, when the land was restored to the public domain, Hackley's claim having been suspended during the Government occupancy of the land, his right to pre-empt then and there accrued, and that this right descended to his heirs or legal representatives. This contention is not well taken.

In the case of U. S. *vs.* So. Pac. R. R. Co. this court held that the grant to the company, using the words "that there be and is hereby granted, etc.," was a grant *in presenti*. But the court further held that the title did not attach to any specific sections of land until they were capable of identification, and set aside and canceled the patents that were issued to the Southern Pacific R. R. Co., notwithstanding the fact that the company had built its railroads and spent millions of dollars in improvement of the property.

And further uses this language:

"It was held in the case of The Kansas Pac. R. R. *v.* Dunmeyer, 113 U. S., 629, that where a homestead right had attached to a tract at the time of the definite location of the railway company's line, which homestead was afterwards abandoned, the tract was simply restored to the public domain, and did not pass to the railway company under its grant; that the grant only attached to lands which were subject to the grant at the time, and that the company had no interest in the question as to what afterwards became of a tract which was not public land at the time its grant became fixed."

On page 644, the court observed:

"The right of the homestead having attached to the land, it was excepted out of the grant as much as if in a deed it

had been excluded from the conveyance by metes and bounds."

The same doctrine was affirmed in Hastings & D. R. Co. *vs.* Whitney, 132 U. S., 357; Sioux City & I. F. T. L. Co. *vs.* Griffey, 143 U. S., 32; Bardon *vs.* Northern Pac. R. R. Co., 145 U. S., 535, and in the case of The So. Pac. R. R. Co. *vs.* Bell, 183 U. S., 675 to 690.

In the case at bar Hackley was never in possession of this property under any claim of title. He made no valuable improvements upon the property. No wrong can possibly be done to Hackley or to his heirs, the only possession asserted being a *temporary occupancy without claim of title.*

After the lands were restored to the public domain the legal representative of the estate of Hackley made no effort to procure this land for five years. Entry was made by Carew; Carew went into possession of the property and continued to occupy it; he and Mrs. Carew have made improvements upon the property, have developed it, and, so far as Hackley's heirs were concerned, remained in peaceable possession of the property for five years before any claim was asserted on the part of the Hackley heirs.

1st. It is clear, therefore, that the lands in controversy were actually occupied by the United States Government, through the War Department, at the time of and two years prior to the passage of the act of April 22, 1826, and thus used for public purposes, and thereby segregated from the public domain.

2d. That the occupation of Hackley, between November, 1823, and February, 1824, being an unlawful occupancy, could not vest in him any lawful claim to the land, it being admitted by the pleadings and by the argument of counsel that in residing upon the land Hackley had no claim and asserted no claim, but recognized the ownership of the United States Government. Hackley therefore could acquire no

inceptive right of pre-emption by the temporary occupancy of the lands of another.

3d. The lands involved became, on the 10th of December, 1830, by Executive order, a permanent "military reservation," thereby permanently segregated from the public domain five years before the assertion of any claim by Hackley to any part thereof.

4th. That no right or interest in the land could have possibly accrued to or vested in Hackley until the notice to the register, in 1835, and at the time of the filing of that notice the United States, the owner of the fee in the property, was occupying and using the lands for public purposes by authority of law, and the lands were not subject to public or private entry, and no right of title therein could possibly have vested in Hackley or any one else claiming under the act of April 22, 1826, and July 5, 1813.

5th. The lands involved were at the time and date of the notices of claim made by Hackley lawfully segregated from the public domain and were not subject to entry. Upon the restoration thereof to the public domain, in 1883, the land was subject to disposition under the laws existing at the time of such restoration, and no right thereby accrued to Hackley or to his heirs. The property was regularly and legally disposed of in accordance with the existing laws, and no error was committed by the Secretaries in the disposition of the property.

This demurrer is therefore well taken, and the lower court committed no error in sustaining the same and dismissing complainants' bill, nor did the Court of Appeals commit any error in the affirmance thereof.

Robert J. Hackley did not conform to the requirements of the acts of April 22, 1826, and February 5, 1813, and acquired no vested rights thereunder; hence his heirs, the complainants, could not, and did not, acquire any interest therein.

We will discuss the fourth and fifth grounds of demurrer together, being as follows:

4th. It appears from the allegations of complainants' bills and from the exhibits attached thereto that Robert J. Hackley did not, and could not in his lifetime, conform to the requirements of section 1 of the act of Congress of April 22, 1826, and of section 2 of the act of Congress of February 5, 1813, and therefore acquired no rights thereunder.

5th. Robert J. Hackley having failed to acquire any vested rights in and to the lands described in complainants' bills, at the time of his death he had no interest in such lands which could descend to his heirs, the complainants herein.

Both Secretary Noble and Secretary Smith have decided that Robert J. Hackley did not conform to the requirements of section 1 of the act of April 22, 1826, and of section 2 of the act of February 5, 1813. It is clear that Hackley could not have conformed to the requirements of these laws. The surveys were not made until many years after his death. The plat of the survey was first filed in the local land office at Gainesville, Florida, on March 22, 1883. These are admitted findings of fact that cannot be reviewed by the courts.

It is contended by counsel for the complainants that when Hackley presented his affidavits to the register at St. Augustine that this was a complete and full compliance with the law. But the act of April 22, 1826, requires a compliance with the terms, conditions, stipulations, restrictions,

and provisions of the act of February 5, 1813. That act requires the payment of a small fee to the register. The register had no authority to file these affidavits *unless accompanied by a notice of the claim, wherein the claimant shall designate the quarter section which he claims and shall pay to the register for such filing twenty-five cents.* There is no evidence that such notice was ever given. It could not have been given, because such notice involved a survey in order to designate the quarter section.

This act requires, further, that any person who has delivered his notice of claim is entitled, according to the provisions of the act, to a preference in becoming the purchaser of a quarter section of land. Such person so entitled shall have a right to enter the same with the register of the land office on producing his receipt from the receiver of public moneys for at least one-twentieth part of the purchase money, as in the case of other public lands sold at private sale.

There is no allegation that Hackley ever applied for or received any receipt from the receiver of public moneys, nor that he ever paid or tendered to the receiver of public moneys any portion of the purchase-money for the said lands. There is no allegation, nor is there any evidence, nor is there any contention that Hackley ever had any communication with or any dealings with the receiver of public moneys. The only officer authorized by law to receive public moneys, and thereby to commit the Government to the sale of any of its property under the pre-emption laws, was the receiver of public moneys. The entry could not precede these requirements, but must have followed such requirements. These requirements were conditions precedent to the acquiring of any legal rights on the part of the proposed pre-emptor. The act of April 22, 1826, cannot by any process of reasoning be construed to mean the absolute conveyance of title on the part of the Government, it merely declaring that certain persons qualified to receive should

have a preference in the right of purchase, provided they conformed to certain conditions and requirements of the act of July 5, 1813.

Hutchings *vs.* Low, 15 Wall., 77.

As early as 1827 this court defined the meaning of the word "enter" or "entry" in the case of Chotard *et al. vs.* Pope *et al.*; says the court:

"It means that by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim in the office of an officer known in the legislation of several States by the epithet of an entry-taker, etc."

12th Wheat., page 588.

As early as 1822, in the case of Mathews *vs.* Zane *et al.*, Chief Justice Marshall, for the court, declared "that the payment of the money required by the act is obviously indispensable to the purchase. Without such payment the sale prescribed by law could not be made; and certainly no sale, had the register attempted to make one, could be valid, if made in opposition to the law." But in this case there is no evidence, even that the register filed these affidavits. *They have* no file *marks upon* them; they *are not certified;* they *have no authenticity;* they *did not identify the property;* they referred to the Fort Brooke cantonment, which, at the time of the making of these affidavits, embraced 16 square miles. And the court will observe from examination of the exhibits to the bill that before the Interior Department it was contended by counsel for the Hackley heirs that the property beyond and exclusive of the actual occupancy by the Government troops was not reserved and that these heirs were entitled to the other lands, exclusive of lot 9, which is now expressly and specially claimed by them. This *contention was* really an *abandonment of the claim of lot* 9, *whereon the houses and improvements* are *alleged to have been situated* (opinion Secretary Smith, p. 49, Trans).

If, then, Hackley did not conform to the specific and essential requirements of the law under which his heirs claim, did he have such title or vested right as could descend to his heirs?

If the complainants in this case recover at all, it must be by inheritance from the deceased. This court has repeatedly held that there must have been such vested right to entitle recovery by the heirs, and has declared the doctrine that such vested right cannot be acquired by occupancy and cultivation of unsurveyed public lands.

"A person cannot acquire, by his occupation only, of unsurveyed lands of the United States, a right of pre-emption to them under the laws of the United States. Where nothing was done by an occupant of public land beyond his occupancy, and his death occurred two years before the surveys were made, the privilege of purchasing the land was not acquired by him so as to be available to his heirs."

Buxton *et al. vs.* Traver *et al.*, 130 U. S., 232.

Robert J. Hackley having failed to acquire any vested rights in the lands involved, at his death he had no interest therein which could descend to his heirs, the complainants herein. The statement or proof of Hackley in 1835 and refiled in 1843 was premature and gave him no rights.

Lansdale *vs.* Daniels, 100 U. S., 113.

Under the early acts of Congress pre-emption rights did not descend to the heirs of a pre-emptor. The act of March 3, 1843, made provision for this.

Rev. Stat., sec. 2269.

This act was construed by this court in the case of Buxton *et al. vs.* Traver *et al.* In that case it is held:

"That section 2269 of the Revised Statutes does not give to heirs of a deceased occupant of unsurveyed public lands, who, during his life, did nothing beyond its occupation and

improvement, the same rights which are conferred upon heirs of a person entitled at the time of his death to the benefit of the pre-emption laws."

130 U. S., 232.

Hutchings *vs.* Low, 15 Wall., 77 (Yosemite Valley case).

Frisbie *vs.* Whitney, 9 Wall., 187.

Gonzales *vs.* French, 164 U. S., 346.

It is only *where the pre-emptor has paid his money and obtained the register's certificate of purchase* that his "right of pre-emption" has been merged in emption. This principle is asserted by Attorney General Speed, 11 A. G. Op., 462, where he says: "It is not to be doubted that settlement on the lands of the United States, no matter how long continued, confers no right against the Government. The land continues subject to the absolute disposing power of Congress until the settler has made the required proof of settlement and improvement and has paid the requisite purchase-money." This principle has been received and acquiesced in by the Secretaries of the Interior, and has come to be the recognized rule of action in that Department. This construction of the law has also been asserted by the courts of last resort in several States.

Frisbie *vs.* Whitney, 9 Wall. (U. S.), 187.

Bower *vs.* Higbee, 9 Mo., 261.

Phelps *vs.* Kellogg, 15 Ill., 135.

Grand Gulf R., etc., Co. *vs.* Bryan, 8 Smed. & M. (Miss.), 268.

People *vs.* Shearer, 30 Cal., 650.

Hutton *vs.* Frisbie, 37 Cal., 475.

Did Hackley acquire any rights by the unlawful possession of the lands of the Government?

The sixth ground of the demurrer is: It does not appear from the allegations of complainants' bills that Robert J. Hackley was ever in lawful possession and occupancy of the lands described in said bills, or any part thereof.

The occupancy alleged on the part of Hackley was between November or December, 1823, and February, 1824.

The appellants' counsel argue that the act of Congress did not require lawful possession, but actual inhabitance and cultivation.

The word "inhabit" is defined to be "*to occupy as a home, or to remain in as a permanent place of abode, or fixed residence.*" An inhabitant is one who resides actually and permanently in a given place and has his domicile there.

Black's Law Dictionary; 40 Ills., 197.

A mere temporary possession as was held by Hackley in violation of law cannot constitute a habitation as contemplated by the act of Congress. The possession in the sense of acquiring a right or privilege is necessarily a lawful possession—that is, a possession in good faith by one who believes that he has a right to the possession.

Black's Law Dictionary.

One who knows that he is not entitled to the possession is termed a possessor *mala fide.*

Black's Law Dictionary.

This is the view adopted by the Land Department.

Secretary Noble says:

"By the law in force at the date of Hackley's said settlement, persons were not allowed to settle upon any of the lands of the United States, except as tenants at will, under contract to be entered into with the local land officers. See act of Congress approved March 3, 1807 (Stat., 445); act of

March 30, 1822, sec. 9 (3d Stat., 654). There can hardly be serious question, I think, that when the officers of the Government selected the site of the said reservation, Hackley had no rights thereto. His settlement was clearly illegal, and by the express terms of said act of 1826, said reservation being rightfully claimed as a reservation, was excepted from its provisions."

Secretary Smith says:

"It further appears that in March, 1824, in obedience to instructions from the War Department, that portion of said reservation now in controversy, was occupied by the United States troops in cantonment and was so used until Dec., 1830, and when it was formally reserved by executive order in which its limits were fixed at sixteen miles square. Subsequent to this, said lands were in a state of reservation the greater portion of the time, until Jan. 4, 1883, when they were relinquished and finally restored to the public domain.

"R. J. Hackley was ejected from the land by the military in 1824.

"At that time, the provisions of the act of March 3, 1807, (2 Stat., 445) were in force in the State of Florida, having been re-enacted in the act providing for the establishment of a territorial government in said State on March 30, 1822 (3d Stat., 645). The first sections of the act of March 3, 1807, *supra*, provided:

"'That if any person or persons, shall after the passage of this act take possession of, or make a settlement on any of the lands ceded or secured to the United States by any treaty made with a foreign nation, or by a cession from any State to the United States, which lands shall not have been previously sold, ceded or leased, by the United States, or the claim to which lands, by such person or persons, shall not have been previously recognized and confirmed by the United States, or if any person or persons shall cause such land to be thus occupied, taken possession of, or settled, or shall survey, or attempt to survey, or cause to be surveyed any such lands, or designate any boundaries thereon, by marking trees or otherwise, until thereto duly authorized by law, such offender or offenders shall forfeit all his or their right, title and claim, if he hath, or they have, of whatsoever nature or kind the same shall or may be, to the lands aforesaid, which he or they shall have taken possession of, or

settled, or caused to be occupied, taken possession of or settled, or which he may, or they shall have surveyed, or aitempted to survey, or cause to be surveyed, or the boundaries thereof, he or they shall have designated, or caused to be designated, by marking trees or otherwise.'

"When R. J. Hackley was ejected from said land by the military in 1824, he could not, in view of the provisions of the act above quoted, have initiated any claim to said lands by virtue of his settlement."

These are findings of fact from the evidence before the Interior Department, and are conclusive. They are fully sustained by the statutes then in force.

2d Stat., 445.

3d Stat., 654.

No declaratory statement was filed by the administrator of the estate of Robert J. Hackley nor by the heirs of the deceased (complainants) within three months after the receipt and filing in the district land office of the approved plat of the township embracing the alleged pre-emption settlement.

This point is specifically raised by the seventh ground of the demurrer, as follows:

"It does not appear in and by the allegations of complainants' bills that a declaratory statement was filed by the administrator of the estate of Robert J. Hackley, or by his heirs, within three months after the receipt and filing at the district land office of the approved plat of the township embracing the alleged pre-emption settlement as required by sections 2266 and 2269 of the Revised Statutes of the United States, and a failure to file said declaratory statement within the time prescribed by the act of Congress, was a forfeiture of any rights Robert J. Hackley, or his estate, or his heirs, may have acquired by virtue of the alleged settlement upon said Government lands."

The act of February 5, 1813, provides, among other things, that the party shall produce his receipt from the receiver of public moneys for at least one-twentieth part of the purchase-money, as in the case of other public lands sold at private sale. This would indicate clearly that these pre-emption filings were to be made in accordance with the rules and regulations of the Land Department of the Government—that is to say, in accordance with the usual system in the making and filing of pre-emption entries in the land office. It was required by the act that these entries should be made in the district land office where the land was situated, thus showing that it was not the intention of Congress to make this an exclusive jurisdiction, different and distinct from all other methods of pre-emption. The only difference being that the requirements as to the qualifications of the pre-emptor were different from other acts providing for the pre-emption of public lands.

But Hackley failed to perfect his pre-emption entry in his lifetime. The survey of the lands and the filing of the plat in the district land office at Gainesville, Florida, was subsequent to the act of May 30, 1862, embodied in section 2266 of the Revised Statutes. This section, requiring that the declaratory statement should be filed within three months from the date of the approved plat in the township embracing such pre-emption settlement, is therefore applicable to all such cases. It is a rule of construction of statutes that all consistent statutes must stand together, though enacted at different times, relating to the same subject.

Sutherland on Stat. Cons., sec. 283.

Also that a statute must be construed with reference to the whole system, of which it forms a part; and statutes upon cognate subjects may be referred to, though not strictly *in pari materia*.

Sutherland on Stat. Cons., sec. 284.

It certainly was necessary to file a declaratory statement after the plat was filed in the land office. This was essential under the statutes and rules of the Department in 1883, when the plat was filed.

The failure to do so was fatal to the claims of the complainants, and their suit must fail.

Lansdale *vs.* Daniels, 100 U. S., 1.
N. P. Ry. Co. *vs.* De Lacy, 174 U. S., 630.
U. S. *vs.* Fitzgerald, 15 Pet., 407.
Gonzales *vs.* French, 164 U. S., 338.
Johnson *vs.* Towsley, 13 Wall., 72.
Atherton *vs.* Fowler, 96 U. S., 513.

In the case of Moore *vs.* Robbins, 96 U. S., at page 538, the court says:

"Applying to the case before us these principles, which are so well established and so well understood in this court as to need no further argument, we are of opinion, if we take as proved the sufficiency of the occupation and improvement of Bunn as of the date which he alleged, his claim is fatally defective in another respect in which the officers of the Land Department were mistaken as to the law which governed the rights of the parties, or entirely overlooked it."

In the recent case of Atherton *vs.* Fowler (*ante*, 732) we had occasion to review the general policy and course of the Government in disposing of the public lands, and we stated that it had formerly been, if it is not now, a rule of primary importance to secure to the Government the highest price which the land would bring by offering it publicly at competitive sales, before a right to any part of it could be established by private sale, or by pre-emption. In the enforcement of this policy the act of September 4, 1841, 5th Stat. at L., 457, which for the first time established the general principle of pre-emption, and which has remained the basis

of that right to this day, while it allowed persons to make settlements on the public lands as soon as the surveys were complete and filed in the local land office, affixed to such a settlement two conditions as effecting the right to a pre-emption. One of these was that the settler should give notice to the land office of the district, within thirty days after settlement, of his intention to exercise the right of pre-emption, and the other we will give in the language of the 14th section of that act:

"This act shall not delay the sale of any of the public lands of the United States beyond the time which has been or may be appointed by the proclamation of the President, nor shall any of the provisions of this act be available to any person who shall fail to make the proof of payment and file the affidavit required before the commencement of the sale aforesaid."

5 Stat. at L., 457.

"Whatever Bunn may have done on the 8th of November, and up to the 15th of that month, in the way of occupation, settlement, improvement, and even notice, could not withdraw the land from sale at public auction unless he had also paid, or offered to pay, the price before the sale commenced."

No effort was made by the Hackley heirs to secure this land until the 14th of October, 1887, and then the administrator of Hackley attempted to file his declaratory statement and to make pre-emption entry, not only under the acts of April 22, 1826, and February 5, 1813, but also claiming the benefit of the act of July 5, 1884. We beg to invite the attention of the court to the fact that the administrator did not first pay the receiver one-twentieth part of the purchase price and take his receipt therefor, and present this receipt to the register as required by the act of February 5, 1813, but he declares that he tenders the Government price of $1.25 per acre, together with the required Government fees in the paper referred to, showing that he adopted the rules

and regulations of the Department and abandoned the contention that he was to act exclusively under the acts of 1826 and 1813. And at this time it should be remembered that Lizzie W. Carew and husband had been in the actual, lawful, open, and adverse possession of this property, under claim of title by virtue of the homestead entry of E. S. Carew, for nearly five years.

But counsel for appellants argue that the survey was suspended and complainants could not file declaratory statement. No such fact has been alleged or shown by the record. The survey was not suspended. The Commissioner suspended further *entries*, but not the surveys. Other claimants made attempts to pre-empt and presented their claims through the Land Department. The administrator of Hackley waited more than five years before even making an attempt to file a declaratory statement. A pre-emptor has only a preference right, and if he fails to assert his claim within the statutory period, that right is lost, and the settler next in line of preference takes the land.

Johnson *vs.* Towsley, 13 Wall., 72.

Neither proof nor payment were made for the land by Robert J. Hackley, or his heirs, within thirty months after the date prescribed therein for filing declaratory notices had expired as required by sec. 2267 and 2269, of Revised Statutes of United States.

"The failure of a pre-emption claimant to make proof and payment within the thirty months required by the U. S. Rev. Stat., sec. 2267, forfeits his right without any cancellation on the records."

"When no proof and no payment have been made within the time provided for by law, the record will show the fact, and that the right of the claimant has expired and the claim has ceased to exist."

North. Pac. R. R. Co. *vs.* De Lacy, 174 U. S., 622.
Gonzales *vs.* French, 164 U. S., 343.
Johnson *vs.* Towsley, 13 Wall., 72.
Atherton *vs.* Fowler, 96 U. S., 513.

All of the pre-emption laws restrict the pre-emptor in the time of the filing of his declaratory statement and in the making of his proof, and the courts have invariably sustained the officers of the Interior Department in the enforcement of such restrictions and requirements.

Johnson *vs.* Towsley, 13 Wall., 72.
Lansdale *vs.* Daniels, 100 U. S., 113.

"Such a notice, if *given before* the time allowed by law, is *a nullity*, but where it is filed subsequently to the period prescribed, it is operative and sufficient, unless some other person had previously commenced a settlement and given the required notice of claim."

Johnson *vs.* Towsley, 13 Wall., 72.
Moore *vs.* Robbins, 96 U. S., 530.
Morrison *vs.* Stalnaker, 100 U. S., 213.

The decision of the Secretary of the Interior that Robert J. Hackley and his administrator had failed to comply with the pre-emption laws in force, and that his heirs were not entitled to the land in controversy, is a mixed question of law and of fact, and cannot be reviewed by the courts (9th ground of demurrer).

The decision of the register and receiver and of Acting Commissioner Stone, predicated upon the hearing in 1889, cannot be invoked in this case to substantiate the claims of the complainants, for the reason that both of the said decisions were reversed and annulled by the action thereon had and taken by the Secretary of the Interior, Hon. J. W Noble, and subsequently by the Secretary of the Interior, Hon. Hoke Smith, upon the final review of the case. Certainly the decision of Secretary Noble declined to award the land to the Hackley heirs because of the failure of Hackley

in his lifetime to conform to the requirements of the acts of Congress in force up to the time of his death.

Secretary Noble, while he does say that "the facts relative to his settlement do not appear to be disputed," and he does refer to the affidavits filed in 1835 and to the notice filed on November 27, 1843, also refers to the notice filed October 14, 1887. He further recited the act of April 22, 1826, and the act of February 5, 1813, to sustain his position, and says further: "Besides, by the law in force at the date of Hackley's said settlement, persons were not allowed to settle upon any of the lands of the United States, except as tenants at will, under contract to be entered into with the local land officers. There can hardly be serious question, I think, that when the officers of the Government selected the site of said reservation, Hackley had no right thereto. His settlement was clearly illegal, and by the express terms of said act of 1826, said reservation being rightfully claimed as a reservation, was excepted from its provisions." And says further that "the Government has never offered said reservation for sale. The War Department legally acting, by direction of the President, took possession of said land, and continued in possession thereof until it was relinquished to this Department for disposal under the laws then existing." He further states that Hackley had no vested right in and to said land in his lifetime, because his settlement was illegal in its inception, and at the date of his death he had no interest in said land which could descend to his heirs.

The Secretary, therefore, held:

1st. That Hackley made the settlement on the land, but that he did not conform to the acts subsequently enacted by Congress.

2d. That the property was legally reserved before the passage of the act of 1826.

3d. That Hackley's settlement was illegal in its inception.

4th. That the Government continued in possession of the property until relinquished to the Interior Department in 1883.

5th. That Hackley had no vested right in the property at the time of his death.

These points are mixed questions *of law* and *of fact*, and cannot be reviewed by the courts. The Secretary arrived at his conclusions from the facts submitted and established by the proofs.

Secretary Smith does state in his decision that Hackley entered upon the lands in 1823, did not relinquish his claim, and that "he made settlement in good faith so far as the record discloses, etc." And says:

"It further appears that in March, 1824, in obedience to instructions from the War Department, that portion of said reservation now in controversy was occupied by the United States troops in cantonment, and was so used until Dec., 1830; it was formally reserved by executive order in which its limits were fixed at sixteen square miles. Subsequent to this, said lands were in a state of reservation the greater portion of the time until January 4, 1883. That Hackley was ejected from the land in 1824."

And says further:

"When R. J. Hackley was ejected from said lands by the military in 1824, he could not, in view of the provisions of the act above quoted, have initiated any claim to said land by virtue of his settlement."

It is clear from the decision of Secretary Smith that he, too, decides that Hackley did not and could not comply with the act of 1826, because the same, as shown by the proofs, had been lawfully reserved. He finds as a fact that the

reservation was lawful, and fully sustains the views of Secretary Noble in regard to Hackley's claim.

"It is a well-established rule of law that in contests before the Land Department, the decision of the Secretary of Interior is final, except in cases of fraud, mistake, or an erroneous construction of law. The decision of the Secretary upon the facts of a case, and upon *mixed questions* of law and fact, is always final, and the decisions of the courts have generally sustained the Secretary, in the absence of positive fraud, or a mistake, wherein the unsuccessful party has been denied some right which materially affected his interests, or where misconstruction of the law has worked a hardship and injury upon an interested party."

25 Fla., 759, citing—

Quinby *vs.* Conlan, 104 U. S., 420.

The 10th ground of demurrer is as follows:

"The honorable Secretary of the Interior of the United States, having decided on March 8, 1898, as shown by Exhibit 'K,' to complainants' bills, that all of the defendants except Lizzie W. Carew, the sole heir-at-law of the original patentee, were innocent, *bona fide* purchasers, as shown by the evidence before the Interior Department, such fact became finally adjudicated, and cannot now be reviewed by the courts, and the bills in this cause, as to all of the defendants except Lizzie W. Carew, should be dismissed."

In considering this question, Secretary Bliss, in his decision, says:

"Another obstacle in the way of a successful maintenance of a suit to vacate these patents lies in the fact made to appear by affidavits and exhibits, that all, or nearly all of the land so patented, has been sold and conveyed to third parties. The presumption is that such parties are innocent purchasers for value and without notice of any defect in the title of the patentees, on account of fraud, or other infirmity."

Even if the patents were procured through fraud, unless they are absolutely void on that account such purchasers would be protected by the courts.

Appellants' counsel argue that the complainants are not precluded by the decision of Secretary Bliss, because they were not parties thereto. They are equally bound by the rulings of the Interior Department, whether parties thereto or not. They seek the benefit of the pendency of the proceeding of Bilbie *et als.* as an excuse for their laches in instituting this suit, and we submit that this being the final action of the Interior Department and made a part of the allegations of complainants' bill that the court will consider the findings of fact by Secretary Bliss and will uphold them.

The 11th ground of demurrer is as follows:

"11th. It appearing from the allegations in complainants' bills that patent issued on the 30th day of July, 1896, and that the title of all of the defendants who purchased from Lizzie W. Carew was predicated upon said patent, such purchasers are *bona fide* and legal in the absence of fraud, and complainants' bills should be dismissed as to all of the grantees of Lizzie W. Carew."

It is true the complainants allege that the defendants, other than Mrs. Carew, are not *bona fide* purchasers for value. But the decisions of the Department of the Interior, made parts of the bill, contradict in effect this allegation. Some of the defendants purchased from Williams *et als.*, and not from the patentee. In fact, all except Hall have deeds from Williams *et als.* Neither of the Williamses is made a party to this proceeding. If *bona fide* purchasers, then these bills must be dismissed as to such defendants.

Kearnes *vs.* Hill, 21 Fla., 185.
Levy *vs.* Cox, 22 Fla., 546.
Doyle *vs.* Wade, 23 Fla., 90.

What are the facts here? Two Secretaries decided that the Hackley heirs had no right, title, or interest in the land. These decisions are matters of record. The Hackleys waited four and a half years after patent issued and did not institute any proceedings to recover the property. Was there

any reason for a prudent man to anticipate this claim? Were not the final adjudication of the Interior Department, acting within its jurisdiction, and the issue of the patent sufficient to justify the honest belief of a prudent man that the patentee had a right to convey the legal title acquired from the Government?

The 12th ground of demurrer is:

"12th. There is no specific allegation of error of construction of law in complainants' bills, and in the absence of such specific allegations this suit cannot be maintained, and complainants' bills should be dismissed."

This court cannot take jurisdiction of a cause merely to interpret a statute or act of Congress. There should be some specific averment of mistake or fraud, supported by clear and satisfactory proof.

U. S. *vs.* Maxwell Land Grant Co., 121 U. S., 325.
Quinby *vs.* Colan, 104 U. S., 420.
Lansdale *vs.* Daniels, 100 U. S., 113.

This action is barred by the statute of limitations of the State of Florida.

This point is raised by the 13th ground of demurrer, to wit:

"It appears from the allegations of complainants' bills that patent issued for the lands involved in this suit to Edmund S. Carew on the 30th of July, 1896, more than four years before the filing of complainants' original bill, and this suit is barred by the statute of limitations of the State of Florida, par. 4, sec. 1294, of the Rev. Stats. of the State of Florida."

"Where it appears on the face of the bill that the bar of the statute has attached, objection may be made and defense raised by demurrer."

13 v. Pldg. & Pr., pp. 201, 206, and 101.
City of Apalachicola *vs.* The Apalachicola Land Co., 9th Florida, p. 340.

Actions of this character are not specifically provided for, and hence the section of the Rev. Stats. cited is applicable.

The supreme court of Florida has construed this section, and held that it applies to suits for dower and mesne profits.

Branch *vs.* Cole, 18th Fla., 368.

Counsel for appellants contend that the case of Branch vs. Cole is not applicable to the case at bar, and cite in support of such contention the cases of Wade *vs.* Doyle, 17th Florida, 532, and Sloan *vs.* Sloan, 25th Fla., 33. The case of Wade *vs.* Doyle was an ejectment suit, and the question of adverse possession against the true title was involved. Being an action involving the title to real property, it can have no application to the present case. The case of Sloan *vs.* Sloan was a suit in equity to remove a cloud from a title, and defendants all plead adverse possession and sought to establish title by adverse possession. The court properly held that such claim to be effective against the true title should be continuous for the period of seven years.

Neither of those cases involved any question of the declaration of a trust. The defendants in the case at bar do not claim by adverse possession, but claim that a declaration of trust is barred under the section of the Rev. Stat. above cited.

"A court of equity is governed by the analogies of the statute of limitations of a court of law."

Norris *vs.* Haggin *et al.*, 136 U. S., 386.
Stafford *vs.* Bryan, 1st Paige Ch., 236.
Kane *vs.* Bloodgood *et al.*, 7 John. Ch., 88.
11th Am. Dec., 417.
43d Am. Dec., 317.
46th Am. Dec., 534.
Baker *vs.* Cummings, 196 U. S., 188.
Also, very full notes.

If the plaintiff has been guilty of gross laches, or if he had not applied for relief until after a long lapse of time,

unexplained by equitable circumstances, his bill will be dismissed. A court of equity will not administer relief to gross negligence any more than a court of law.

7 Wait Acts & Def., 229.
Badger *vs.* Badger, 69 U. S., 89.
New Albany *vs.* Burke, 78 U. S., 96.
Sullivan *vs.* Portland, 94 U. S., 806.
Sanchez *vs.* Dow, 23 Fla., 445.
Brashier *vs.* Gratz, 6 Wheat., 528.
King *vs.* Hamilton, 4 Pet., 311–329.
Pratt *et al. vs.* Carroll, 8 Cranch, 47.

This subject is elaborately and ably discussed in the case of Edmendorf *vs.* Taylor *et al.*, 10 Wheat., 152 (see notes specially); also Thomas *vs.* Brockenbrough, 10 Wheat., 146.

The courts of the U. S. adopt the interpretation and construction of State statute given by the courts of the State, and will take notice of and enforce the public statutes of the State within which they are adjudicating.

McCleny *vs.* Stillman, 3 Pet., 270; note 10 Wheat.

One who is not a trustee, but upon whom the character is forced by a court of equity—only for the purpose of a remedy—may avail himself of the statute.

Baxton *vs.* Moses, 77 Maine, 48.
Carroll *vs.* Green, 92 U. S., 509.
2 Pom. Eq. Jur., 616.
10 Wheat, 174 (notes).
Beach on Trust and Trustees, sec. 208–209.

Appellants' counsel claim that this being a general demurrer to the whole bill, it should have been overruled because some of the complainants are minors, and cite from the courts of Texas and Georgia. These citations are

local in their application. No such principle prevails in the practice of this State, nor in the Federal courts. To avoid the plea of the statute of limitations it is necessary to show that all of the plaintiffs were under a disability to sue.

Marstellar *et als. vs.* McClean, 7 Cranch, 156.
A. & E. Ency. of Law, 2 Ed., v. 19, p. 183.

Again, in this case, under the act of April 22, 1826, *this proceeding should have been instituted by the legal representative of the deceased.* It is also provided that the pre-emption right can be perfected by the executor or administrator under section 2269 of the Rev. Stat. of the U. S. If the administrator could have instituted this proceeding, then he would be barred if four years' limitation applies. As the administrator would be barred, the statute is equally effective against the complainants, who are minor heirs.

Meeks *vs.* Olpherts *et al.*, 10th Otto, 564.

"There is no equity in complainants' bills" (14th ground of demurrer).

To entitle complainants to recover they must show a better right to the land than the patentee. It is not sufficient to show that the patentee ought not to have received the patent. It must appear by the law, properly administered, that the title should have been awarded to the complainants as heirs-at-law and distributees of Robert J. Hackley, deceased.

Sparks *vs.* Pierce, 115 U. S., 408.
Behall *vs.* Dilla, 114 U. S., 47.
Lee *vs.* Johnson, 116 U. S., 48.

It is only where the officers of the Interior Department have misconstrued the law applicable to the case, as established before the Department, and thus have denied the par-

ties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, in a proper proceeding, interfere and refuse to give effect to their action.

Johnson *vs.* Towsley, 13 Wall, 72.
Shepley *vs.* Cowan, 91 U. S., 330–340.
Moore *vs.* Robbins, 96 U. S., 530.
Marques *vs.* Frisbie, 101 U. S., 473.
U. S. *vs.* Minor, 114–233.
Lee *vs.* Johnson, 116 U. S., 48.
U. S. *vs.* Iron Silver Ming. Co., 128 U. S., 579.
Quinby *vs.* Conlan, 104 U. S., 420; 25 Fla., 760–'1.

Not only have complainants failed to show any title of any character, but the record as disclosed by the pleadings of complainants shows conclusively that the entryman, Carew, was entitled to the land, and no error of law was committed by the Land Department of the Government in the final disposition of the land involved. If no error of law was committed, the complainants' suit must be dismissed.

Hawley *vs.* Diller, 178 U. S., 490.

Furthermore, under the departmental decision rendered by Secretary Noble on the 25th of November, 1892, the Government refused to allow Hackley's entry. Upon a review of this decision by Secretary Smith, he re-affirmed Secretary Noble's finding as to Hackley's claim. This was not a determination of priority or preference, but an absolute adjudication of the fact that the Government would not recognize the claims of Hackley or his estate or his heirs. Can the courts now declare that the Government shall so recognize these claims? There is no relation of trust and trustees between the Hackley heirs and Carew, for the Department had

already refused patent to the Hackley heirs. This exercise of discretion cannot be controlled by the courts.

U. S. *vs.* Land Co., 5 Wall., 563.

Cox, Sectry., *vs.* U. S., 76 U. S., 554.

Again, Hackley's claim was denied in his lifetime and no appeal taken to the Commissioner of the General Land Office. Under the rulings of the Department and the rules of practice in the Land Office, the decision of the register and receiver became final, unless appealed from within a stipulated time. Nor was the action of the register and receiver in 1887 appealed from when they denied the pre-emption claim, made by the administrator.

Will the courts override the rules and proceedings before the Land Department of the Government, and thus cause confusion and chaos? Has not the Interior Department the same authority to adopt and enforce rules of procedure as the courts? If so, then the complainants have no case (Hawley *vs.* Diller, 178 U. S., 488).

The claim of the Hackley heirs having been eliminated by the departmental decisions, as being without merit, the "Ft. Brooke reservation" was disposed of by the Secretary of the Interior under the existing law of Congress, the act of August 18, 1856—Stat. 11–87—which provides:

"That all the lands heretofore reserved for military purposes in the State of Florida, etc., shall be disposed of and sold in the same manner and under the same regulations as other public lands of the United States."

Secretary Smith, in his decision at page 7 *et seq.*, discusses the provisions of this act fully.

Again, Secretary Bliss, in considering the application of Bilbie *et als.* to set aside the patents of Carew *et als.*, gives the same interpretation to the act of 1856, and held that no error was committed by Secretary Smith, but that the lands were properly disposed of pursuant to the act of 1856 (de-

cision Secretary Bliss, p. 4 *et seq.*). The argument of Secretary Bliss is *logical, clear*, and *conclusive* of the question.

These bills are multifarious for misjoinder of parties and of equitable and legal causes of action.

This question is not raised by the demurrer of the defendants, but, being apparent upon the face of the bill, the court will take cognizance of it and dismiss complainants' bills.

Bauknight *vs.* Sloan, 17th Fla., 284.
Story's Eq. Pldg., sec. 236–237.

If the defendants hold the legal title for the use and benefit of the complainants, then complainants must either follow the specific fund or rely upon their legal remedy against the defendants. They cannot pursue both remedies in one action.

Beach on Trusts & Trustees, v. 2, sec. 690.
58th Amer. Rep., 61.
45 Amer. Dec., 642.
2 Johns. Ch. Rep., 441.

A *cestui que trust* when forced to rely upon his trustee's personal liability occupies a position towards the estate of the trustee which is no better but is identical with that of a simple contract creditor.

Beach on Trusts & Trustees, v. 2, sec. 690.
30th Cal., 17.
8th Amer. Dec., 141.

It is clear that there is no such community of interest on the part of the several defendants in this suit as to justify the filing of one suit against them. Certainly the amended bill cannot be maintained in this action.

Appellants' attorneys have discussed the question of forfeiture, and have cited a number of authorities.

The cases cited all refer to the forfeiture of land grants, made to States and Territories for the construction of railroads, and can have no application to this case. This class of cases refer to grants made *in presenti*, where vested rights are created by the act itself. No such rights are created by the acts of 1826 and 1813, as shown by the authorities which are cited in this brief.

The right of pre-emption, being merely a preference or privilege of entry, requires no forfeiture.

"The failure of a pre-emption claimant to make proof and payment within the thirty months required by the U. S. Rev. Stats., sec. 2267, forfeits his right, without any cancellation on the records."

"When no proof and no payment have been made within the time provided for by law, the record will show the fact, that the right of the claimant has expired and the claim has ceased to exist."

North. Pac. R. R. Co. *vs.* De Lacey, 174 U. S., 622.
Gonzales *vs.* French, 164 U. S., 343.
Johnson *vs.* Towsley, 13 Wall., 72.
Atherton *vs.* Fowler, 96 U. S., 513.

In conclusion we submit that the facts as disclosed by the bills and exhibits are:

1st. That Robert J. Hackley went upon the "Ft. Brooke cantonment" some time in 1823 (November or December) (affidavit of Hackley & Thomas), and made some improvements thereon, but made no claim thereto; that in March, 1824, he was ejected therefrom by the proper authorities; that he never afterwards went upon or occupied the land or any part thereof.

2d. That the land was formally and legally reserved by executive order as a military reservation on December 10, 1830, and remained a reservation for military purposes until relinquished on January 4, 1883. On March 16, 1883, an

approved diagram of the subdivision thereof into seven lots was transmitted by the Commissioner of the General Land Office to the register and receiver of the district land office at Gainesville, Florida. Same was received at Gainesville on March 22, 1883. Edmund S. Carew, husband of Lizzie W. Carew, made homestead entry on same date. Carew and his wife remained in possession of the land; he, to the date of his death, *and she, continuously until the present time*, except as to the parts sold to and occupied by her grantees.

3d. It is alleged that Hackley filed some affidavits with the register of the land office in 1835. On November 27, 1843, he addressed a communication to the register at Newnansville, claiming a pre-emption under the act of April 22, 1826. But it nowhere appears what proof was filed, if any, nor any other action taken by Hackley. Claim not allowed and no appeal taken therefrom.

4th. Hackley died in 1845 without acquiring any vested rights in the land.

5th. No action was taken by the administrator nor by the heirs until October 14, 1887—more than four and a half years after the plat was filed in the local land office at Gainesville, Florida, and lands occupied by Carew. Claim not allowed—no appeal therefrom.

6th. A full, fair hearing was given Hackley's heirs, and the Honorable Secretary Noble decided adversely to their claims November 25, 1892. This decision was affirmed by Secretary Smith in July, 1894.

7th. Patent issued to E. S. Carew July 30, 1896. Application was made to have vacated. Secretary Bliss denied and dismissed the application. The appellants sat by and waited until all others failed to vacate the patent, and now, four

and a half years after patent issued, seek to have defendants' title conveyed to them. Here is the *grossest* and most inexcusable laches.

8th. The facts appear that Hackley did not conform to the act of 1826, which he invoked in letter to register in 1843, nor did he conform to requirements of act of February 5, 1813.

9th. The administrator and heirs did not attempt even to conform to the pre-emption laws.

10th. The Secretary found as a fact that there was a non-compliance with the several acts of Congress by Hackley and by his legal representative and by his heirs.

11th. The Secretary found as a fact that the land was subject to entry March 22, 1883; that Carew was the first entryman; that his entry was in good faith, and that Lizzie W. Carew was entitled to have the land patented to the estate of her husband.

12th. The Secretary decided as a fact that Hackley acquired no vested rights that could or did descend to his heirs.

13th. That all of the defendants other than Lizzie W. Carew are *bona fide* purchasers and their rights and interests are separate and distinct from those of Lizzie W. Carew, and are not proper parties to this suit.

14th. That neither Hackley nor his legal representative has ever made proof, or attempted to make proof, to entitle him to patent, either in accordance with the act of April 22, 1826, and the act of February 5, 1813, or in accordance with the existing acts of Congress or the rules and regulations of the Interior Department.

15th. That no specific error in the construction of law by the Secretaries of the Interior Department has been alleged or shown that would justify review or interference on the part of the court.

We submit that the courts below committed no error in sustaining the several grounds of demurrer, and the decrees of the lower courts should be affirmed.

Respectfully submitted.

WM. WADE HAMPTON,
Of Counsel for Appellees.